TYPOGRAPHICS LEGAL INC DALLAS TEXAS

Supreme Court, U. S.
FILED
MAY 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1701

DR. DON M. SMART, *Petitioner,*

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents.*

ADDENDUM OF EXHIBITS OF JUDGMENT OF THE DISTRICT COURT, COURT OF APPEALS, FIFTH CIRCUIT AND ORDER DISPOSING OF PETITION FOR REHEARING

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Counsel for Petitioner

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

DR. DON M. SMART VS. TEXAS POWER AND LIGHT COMPANY, ET AL	CIVIL ACTION NO. 3-6231-F

ORDER

This is a case in which the Plaintiff-landowner challenges the Texas statute[1] which permits privately owned utility companies such as the Defendant to exercise the right of eminent domain. The case is before the Court on the Defendant's Motion to Dismiss and the Plaintiff's Motion for Summary Judgment. I have concluded that the case must be dismissed and the Plaintiff's Motion denied.

The pleadings before the Court reflect that in 1970 the Defendant utility company began condemnation proceedings in state court involving certain tracts of land in Collin County, Texas. Three court-appointed commissioners determined that the value of the land was $34,000. The Defendant took possession of the land and built a power transmission line across it. The Plaintiff's appeal is still pending in the state court.

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[1] TEX. REV. CIV. STAT. ANN. art. 1436: "Such corporation shall have the right and power to . . . condemn and appropriate the lands . . . and property of any person . . ."

Among several other grounds, the Defendant insists that this case must be dismissed because the landowner, Dr. Smart, withdrew all or part of the funds that were paid into the registry of the state court.

The Supreme Court of Texas wrote in State vs. Jackson, 338 S.W.2d 924, 925 (1965):

> After an award has been made, and the money deposited in the registry of the Court and the landowner has withdrawn the same, he cannot thereafter contend that the taking was unlawful. In legal contemplation, he has consented to such taking and will not be permitted to retain his compensation and at the same time assert that the condemning authority had no right to take his property under the eminent domain power.

The Texas decision in *Jackson* is consistent with the decision of the Supreme Court of the United States in Winslow vs. Baltimore & O.R. Co., 208 U.S. 59 (1908), in which the condemnor was a railroad. The Court held that by accepting the sum awarded in the condemnation proceedings, the landowners lost their right to assert that the condemnation petition was not maintainable.

I believe that the cited decisions require the dismissal of this case.

Accordingly, it is ORDERED that the Plaintiff's Motion for Summary Judgment be in all things denied and that the Defendant's Motion to Dismiss be granted.

ROBERT W. PORTER
United States District Judge

May 7th, 1975

Dr. Don M. SMART,
Plaintiff-Appellant,

v.

TEXAS POWER AND LIGHT COMPANY et. al.,
Defendants-Appellees.

No. 75-2874
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1976.

Power company took an easement over property for electrical transmission lines under the Texas "quick taking" condemnation statutes, and property owner then filed suit challenging the constitutionality of that condemnation law provision which forecloses a landowner who withdraws the money deposited in the registry of the court from thereafter contending that the taking is unlawful. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., dismissed the suit, and plaintiff appealed. The Court of Appeals held that the irrebuttable presumption of legal consent to the taking of the condemnee's property on withdrawal of the deposited funds is not unconstitutional.

Affirmed.

See also, 5 Cir., — F.2d. —.

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*Rule 18, 5 Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

1. Eminent Domain 167(2)

Irrebuttable presumption of legal consent to the taking of a condemnee's property on withdrawal of the deposited funds is not unconstitutional. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

2. Eminent Domain 247(2)

Under Texas law, interest computed from the day of the "quick taking" is a proper element of the final condemnation award. Vernon's Ann. Tex.Civ.St. art. 3265.

3. Constitutional Law 281

The necessities and expediency surrounding the taking of property is a legislative rather than a judicial question and, therefore, "quick taking" without a prior hearing is consistent with due process. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

4. Constitutional Law 281

Even when a condemnee accepts the award and is thus foreclosed from challenging the validity of "quick taking" condemnation, he may pursue his due process right to receive just compensation. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

Plaintiff-appellant challenges the constitutionality of that provision of the Texas "quick taking" condemnation law

which forecloses a landowner who withdraws the money deposited in the registry of the court from thereafter contending that the taking was unlawful. Holding such law to be constitutional, we affirm the dismissal of plaintiff's other constitutional contentions and assertions of invalidity in the taking of his property.

The Texas Power and Light Company took an easement over plaintiff's property for electrical transmission lines under the Texas "quick taking" condemnation statutes, making the required deposit in court of the amount of the award set by the condemnation commissioners. Vernon's Tex.Rev.Civ.Stat.Ann. Arts. 3264-3271. With the state court condemnation suit still pending, the plaintiff brought this action in federal court challenging the constitutionality of the Texas proceedings. Specifically, plaintiff challenges the constitutionality of: first, the "quick taking" provisions of the Texas eminent domain statutes; second, the statutory delegation of eminent domain power to private corporations; and third, the Texas decision of *State v. Jackson*, 388 S.W.2d 924 (Tex.Sup.Ct.1965) which holds that withdrawal by a condemnee of the money paid into the court on quick taking forecloses a legal challenge to the validity of the taking and limits further litigation to the amount of the award.

Since plaintiff took down the funds deposited in the registry of the Texas court, the key to his right to challenge the validity of the taking lies in his attempt to overcome the effect of Texas law that

> In legal contemplation, he has consented to such taking and will not be permitted to retain his compensation

> and at the same time assert that the condemning authority had no right to take his property under the eminent domain power.

State v. Jackson, 338 S.W.2d at 925.

[1] *State v. Jackson's* irrebuttable presumption of legal consent to the taking of a condemnee's property on withdrawal of the deposited funds is not unconstitutional. The eminent domain provisions assure adequate notice to the landowner. By refusing to withdraw the award money, the condemnee may receive a hearing on the validity of the condemnation before a Texas district court, which has authority to grant injunctive relief. Vernon's Tex.Rev. Civ.Stat.Ann. Art. 3269. The United States Supreme Court has approved a similar federal eminent domain procedure (applied in a different context) specifically rejecting asserted Fifth Amendment deficiencies as to notice and hearing. *United States v. Miller*, 317 U.S. 369, 382, 63 S.Ct. 276, 87 L.Ed. 336 (1943). See also *Robinson v. Transcontinental Gas Pipe Line Corp.*, 421 F.2d 1397 (5th Cir.), *cert. denied*, 398 U.S. 905, 90 S.Ct. 1695, 26 L.Ed.2d 64 (1970). The Supreme Court long ago approved the *Jackson*-type presumption of consent:

> But, by accepting the sum awarded for the land actually taken, [the property owners] have lost the right to insist that the petition [of condemnation] was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled . . . .

Winslow v. Baltimore & Ohio Railroad Co., 208 U.S. 59, 62, 28 S.Ct. 190, 191, 52 L.Ed. 388 (1908).

[2] Appellant asserts that the only way he could receive a return on his investment, *i. e.*, just compensation under the Fifth Amendment, pending litigation and in light of the immediate use of his land, is by taking down the initial award. The Texas Supreme Court recently announced, however, that interest computed from the day of the taking is a proper element of the final award under Art. 3265. *Brunson v. State*, 444 S.W.2d 598 (Tex.Sup. Ct. 1969).

[3] The Supreme Court has on numerous occasions held that the "necessity and expediency" surrounding the taking of property is a legislative rather than a judicial question, and therefore "quick taking" without a prior hearing is consistent with due process. *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); *Georgia v. Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924); *Joslin Manufacturing Co. v. Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923); *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64, L.Ed. 135 (1919). See *2,953.15 Acres of Land v. United States*, 350 F.2d 356 (5th Cir. 1965).

[4] One practical effect of this procedure is to require the land owner to initiate any hearing on the validity of the taking, but this aspect of the Texas eminent domain laws has been held to be compatible with due process. *Joiner v. City of Dallas*, 380 F.Supp. 754, 772 (N.D.Tex.), *aff'd*, 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974). Even when a condemnee accepts the award and is foreclosed from challenging the validity of the condemnation,

he may pursue his due process right to receive just compensation. *State v. Jackson, supra.*

We affirm the district court's dismissal of the plaintiff's suit on the ground that he is foreclosed from challenging the validity of the taking. By this disposition, we need not address appellees' arguments on the issues of laches and abstention, nor appellant's nonconstitutional arguments on statutory interpretation and just compensation.

Affirmed.

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United States Court of Appeals
FIFTH CIRCUIT
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February 25, 1976

TO ALL COUNSEL OF RECORD

No. 75-2874—Dr. Don M. Smart v. Texas Power and Light Company, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

by Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. S. L. Lewis
Mr. Frank M. Ryburn, Jr.
Mr. David Thomas